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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION
Petitioner

versus

FRANCES NELL HIGGINBOTHAM,
ADMINISTRATRIX OF THE ESTATE OF
MARSHALL K. HIGGINBOTHAM, ET AL.,
Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondents

Brief in Response to Petition for Writ of Certiorari

STATEMENT OF THE CASE

On August 15, 1967, a Bell Jet Ranger helicopter, owned by Mobil Oil Corporation, petitioner herein, crashed on the high seas off the coast of Louisiana. The three passengers and pilot of the helicopter were killed in the crash. Shortly before the crash, the helicopter, which was used by Mobil in its offshore oil and gas drilling operations, had picked up several passengers at an offshore platform. The passengers aboard the helicopter were Marshall K. Higginbotham, an employee of Baxter Drilling Company, and James Shinn and James Nation, both employees of Mobil.

Four [illegible] were filed and the cases were consolidated for trial in t[illegible]wer court. In the non-jury trial in the District Court, it was held [illegible] insofar as the survivors of Higginbotham were concerned, remedies were available under the Death on the High Seas Act, and the General Maritime Law as set forth in *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 90 S.Ct. 1772 (1970). As to the decedent, Shinn, a

Mobil employee, the District Court held his survivors to have actions under DOHSA, the General Maritime Law and the Jones Act. The District Court found the exclusive remedy of the survivors of Nation, who was found to have been assigned to a fixed platform on the Outer Continental Shelf at the time of his death, to be the benefits available under the Longshoremen and Harbor Workers Compensation Act as made applicable to the Outer Continental Shelf by the Lands Act (43 U.S.C.A. Sec. 1331, et seq.)

Following the trial of the case, the Court held Mobil liable to the survivors of Higginbotham and Shinn on the basis of res ipsa loquitor.

On appeal to the United States Court of Appeal, Fifth Circuit, the finding of liability against Mobil on the basis of res ipsa loquitor was affirmed. The Court further affirmed the finding of the available remedies to the survivors of Higginbotham and Shinn and reversed the District Court's ruling as to the status of Nation. The Fifth Circuit found the lower court had committed an error of law in determining that Nation was not a seaman. Therefore, the Court of Appeal correctly applying the applicable law, found Nation to be a seaman, thus making available to his survivors the remedies provided under the Death on the High Seas Act, the General Maritime Law, and the Jones Act. The Fifth Circuit also reversed the award of damages to the survivors of Higginbotham, holding that the award contained an inflationary factor, and remanded the case to the District Court to determine what, if any, inflationary factor was present in the awards or if the future wage loss was only as a result of a productivity factor. This issue is pending in this Court on an application for writs in No. 76-1722.

Following the rendition of the judgment by the Fifth Circuit, petitioner herein filed these writs seeking to have this Honorable Court review the judgment of the Court of Appeal on several points.

First, petitioner seeks to have the Court determine whether the wrongful death action created by *Moragne* applies only to territorial waters, and not to those waters covered by DOHSA. Secondly, petitioner seeks review of the Fifth Circuit's holding that Nation was in fact a seaman. Thirdly, review is sought concerning the finding of res ipsa loquitor as used against Mobil only.

In response to the request of this Honorable Court, respondents, Jeanette LeBlanc Nation, as personal representative of the decedent, James E. Nation, for the exclusive benefit of his surviving spouse, Ella Menard Nation and his son, Roy Glen Nation, submit this brief in opposition to various portions of the petition for certiorari filed herein by Mobil.

I.

In *Moragne v. States Marine Lines, Inc.*, supra, this Honorable Court, in a unanimous opinion authored by Mr. Justice Harlan, announced the creation of a wrongful death remedy under the General Maritime Law. Prior to that time, it had long been held that in the absence of a statutory remedy for wrongful death, no such action was available. *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140 (1886). In overruling *The Harrisburg*, supra, and its sequels Justice Harlan stated that this result was necessary to remedy at least three "anomalies" then existing in the Maritime Law:

(1) Some victims of accidents in territorial waters could recover under the doctrine of unseaworthiness if they were injured, but not if they were killed;

(2) There could be recovery under DOHSA for deaths on the high seas caused by unseaworthiness, but no recovery for deaths within territorial waters of states where the applicable wrongful death statute did not encompass the doctrine of unseaworthiness;

(3) A Sieracki type seaman could recover for death caused by unseaworthiness within territorial waters if the applicable state statute allowed such recovery, but a Jones Act seaman had no such remedy available to him.

The *Moragne* holding thus did away with these anomalies by providing for a uniform wrongful death action under the General Maritime Law. The specifics of the action, such as who the beneficiaries might be, the applicable statute of limitations, and the damages recoverable were not then determined by the Court, but left to be sifted out through the lower courts in future cases.

Subsequently, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974), the court found that the damages recoverable under the *Moragne* wrongful death action are not limited to pecuniary losses, but may also encompass such items of recovery as loss of society. The court rejected the pecuniary loss test of DOHSA as inconsistent with "the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." 414 U.S. at 588, 945 S.Ct. at 816.

In its petition for certiorari, Mobil contends that the wrongful death action created in *Moragne* is limited in its scope to state territorial waters. This is necessary, petitioner argues, because DOHSA already provided a remedy for deaths occurring more than a marine league from shore. Obviously,if this view advanced by the petitioner correctly states the holding of *Moragne*, then petitioner's liability to the survivors of the unfortunate passengers of the ill-fated helicopter would be restricted to the recoveries provided in the Death on the High Seas Act and, in the case of Shinn and Nation, the Jones Act also.

Respondents herein submit that this argument advanced by petitioner fails to comprehend the true scope of the *Moragne* decision. The case which *Moragne* expressly overruled, *The Harrisburg*, supra, had consistently held that there was no wrongful death action under the General Maritime Law regardless of where the death occurred. There was no limitation in this doctrine as to territorial waters or high seas. The express overruling of *The Harrisburg*, supra, and the creation of the maritime wrongful death action, must also be interpreted to encompass the entirety of the navigable waters subject to the maritime jurisdiction, be they territorial waters or the high seas. To adopt any other interpretation of the decision is not consistent with the express holding of the Court. Further, there is nothing in the *Moragne* opinion or in *Gaudet* which followed shortly thereafter, which indicates that the Court intended to restrict *Moragne*'s ambit to territorial waters. This conclusion is supported by such eminent authorities as Gilmore and Black, *The Law of Admiralty*, 2nd Ed., 1975, P. 368, who state:

"From Justice Harlan's discussion of the 'anomalies' which the Moragne decision was designed to avoid, several conclusions clearly follow. The Moragne remedy covers deaths within territorial waters as well as deaths on the high seas. The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness although in the latter case the decedent must have been a person (e.g., a Jones Act seaman) entitled to the warranty of seaworthiness. As to deaths within state territorial waters, the question whether a state wrongful death statute affords recovery for unseaworthiness is no longer relevant since the remedy is provided by maritime law."

Since the rendition of the *Moragne* ruling, the great majority of lower courts which have dealt with the question presented here, that is, whether the *Moragne* cause of action should be restricted to territorial waters, have concluded there is no such restriction. These cases, citing the clear directive of *Moragne*, have consistently permitted the wrongful death action in instances where the death occurred on the high seas, an area where DOHSA would previously have afforded the sole remedy for non-seamen. See: *Sennett v. Shell Oil Co.*, 325 F.Supp. 1 (E.D. La., 1971); *Powell v. F.J. O'Hara & Sons, Inc.*, 411 F.Supp. 377 (S.D. Me. 1976); *Renner v. Rockwell International Corp.*, 403 F. Supp. 849 (C.D. Cal., 1975); *Estate of Kauzlarich v. Exxon Co.*, U.S.A., 405 F.Supp. 332 (D.C. S.C., 1975); *Nye v. A/SD/S Svendborg*, 358 F.Supp. 145 (S.D.N.Y. 1973); *Law v. Sea Drilling Corp.*, 510 F.2d 243 (C.A. 5th Cir., 1975) and application for rehearing, 523 F.2d 793; (C.A.

5th Cir., 1975).

Petitioner also argues that to allow a *Moragne* type action on the high seas, where the Death on the High Seas Act already provides a statutory remedy, amounts to a judicial reconstruction of DOHSA. However, as Justice Harlan noted in *Moragne*, "no intention appears that the act have the effect of foreclosing any non-statutory remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U.S. at 400, 90 S.Ct. at 1787.

In support of its limited interpretation of *Moragne*, petitioner cites the First Circuit Court of Appeal's decision in *Barbe v. Drummond*, 507 F.2d 794, (C.A. 1st Cir. 1974). In *Barbe*, supra, the First Circuit held that since DOHSA already provided a wrongful death cause of action for deaths occurring on the high seas, *Moragne* was inapplicable, thus the pecuniary loss standard of DOHSA controlled in the fixing of damages. 507 F.2d at P. 801. The fallacy of this position was demonstrated by Chief Judge John Brown of the Fifth Circuit Court of Appeals in the opinion rendered on the application for rehearing in *Law v. Sea Drilling Corp.*, 523 F.2d 793 (C.A. 5th Cir. 1975). In his opinion, Chief Judge Brown contrasted the view adopted by the Fifth Circuit in *Law* with the approach followed by the First Circuit in *Barbe*. He clearly demonstrated that the *Barbe* analysis of *Moragne* simply led to the creation of additional anomalies in the maritime law, the exact situation sought to be remedied by the court in *Moragne*: (523 F.2d at pp. 796-798)

> "That the Moragne remedy has replaced - or at least augmented - DOHSA seems even more cor-

rect to us when the alternative is examined. The *Barbe* position that the DOHSA standard still carries the day on the high seas adds another anomaly to the three that Mr. Justice Harlan hoped to lay to rest in *Moragne*. Simply stated, this fourth anomaly is that under the *Barbe* holding a claimant under substantive maritime law who brought suit at law (either the law side of the federal district court or the state court) under the Savings to Suitors Clause would be entitled to the full panoply of recovery under *Moragne* while those unfortunates who could not meet the requisites of diversity jurisdiction or get personal jurisdiction in either the state or federal court, would be restricted to the DOHSA pecuniary loss. This is because as Mr. Justice Harlan suggested in *Moragne*, the widely assumed exclusively [sic] of DOHSA does not mean that it is the only remedy. What it does mean is that DOHSA suits must be brought in admiralty - a suit for damages in the district courts of the United States, in admiralty * * * ' 46 U.S.C.A. §761.

* * * *

"Where this leaves us is that the alternative to our holding is to impose an unwieldy trifid system on recovery for maritime deaths.[i] If the death occurred within territorial waters, recovery could be had under the *Moragne* wrongful death - survival action. [ii] If the death occurred on the High Seas and the unwary pleader invoked the magical provisions of F.R. Civ. P. 9(h), or in the unlikely event that he could not obtain jurisdiction in any state court, full survival recovery

could be had under the decisional law-created federal maritime survival action but wrongful death recovery would be limited to DOHSA's pecuniary loss.' And [iii] the legal helmsman with a closer eye on the telltale-for the same death on the High Seas - could file his action at law and under substantive maritime principles would recover all that *Moragne* and *Gaudet* allow." (Footnotes omitted).

In summary, the decision of this Honorable Court in *Moragne v. Marine Lines, Inc.*, supra, clearly established a wrongful death action under the General Maritime Law. This action is available whether the death occurred within state territorial waters or upon the high seas. To argue that the new action created by Moragne cannot exist side by side with the previously existing action available under DOHSA fails to consider the fact that DOHSA has, for many years, existed side by side with the Jones Act, which also allows recovery for maritime wrongful death. Further, to limit the holding in Moragne to state territorial waters would necessarily create an entirely new set of "anomalies" to replace those Mr. Justice Harlan sought to remedy by his decision in *Moragne*.

In light of the foregoing, it is respectfully submitted that the decisions of this Court make it entirely clear that *Moragne* provides a wrongful death action on any navigable waters, be they state territorial waters or the high seas. Therefore, there is no requirement that a writ of certiorari issue to consider this point.

II.

As its second reason for requesting this Court to issue a

writ of certiorari, petitioner asserts that the Court of Appeal erred in determining that James E. Nation was a seaman on the date of his death therefore entitling his survivors to recovery under the General Maritime Law, Death on the High Seas Act, and the Jones Act. Petitioner asserts that the holding of the Fifth Circuit is improper in that the correct test to be applied in determining the status of Nation was his assignment on date of death.

At the trial of this case in the District Court, it was held that "as a matter of law his seaman's status is determined by the situs of his work at the time of his injury and that he was not therefore a seaman on the date of his death. 357 F. Supp. 1164 at 1177 (W.D. La. 1973)." On appeal, the Fifth Circuit determined that the trial judge committed reversible error in applying the situs test to determine Nation's status. The court determined that the situs of the work is not determinative in a Jones Act case, thus the decision of the lower court was an error of law, leaving the appellate tribunal to review the findings of fact free of the restriction imposed by the clearly erroneous rule. 545 F.2d at 433. In reviewing the facts adduced at the trial, the Fifth Circuit correctly concluded that Nation was in fact a seaman.

It is submitted that the decision of the Fifth Circuit properly applied the existing law as found by this Honorable Court. In determining whether or not an individual is a seaman within the meaning of the Jones Act, the initial determination is not the situs of the work as petitioner would have the court hold, but in fact whether or not the individual is a member of the crew of a vessel. *Swanson v. Marra Bros.*, 328 U.S. 1, 66 S.Ct. 869 (1946). In making

this determination, the question to be answered is whether the person claiming the status of a seaman was permanently assigned to a vessel (which may include a special purpose structure not usually employed as a means of transport by water, but designed to float on water) or whether the individual performed a substantial part of his work duties on the vessel. *Offshore Company v. Robison*, 266 F.2d 769 (C.A. 5th Cir. 1959). Subsequent cases have held that an individual may claim seaman status despite being stationed on several different vessels during the course of his employment. *Magnolia Towing Co. v. Pace*, 378 F.2d 12 (C.A. 5th Cir. 1967); *Braniff v. Jackson Avenue - Gretna Ferry, Inc.*, 280 F.2d 523 (C.A. 5th Cir. 1960). Additionally, once it becomes clear that a claimant is entitled to status as a seaman, recovery is permitted under the Jones Act even if he suffers injuries while off the vessel and engaged in temporary work for his employer which is unrelated to the service of the ship. *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 80 S.Ct. 247 (1959).

With these principles clearly established, it is evident that the Fifth Circuit properly held Nation to be a seaman. Testimony adduced at the District Court trial showed that in the two years preceding the date of the accident, Nation spent a major portion of his time on various submersible drilling barges either owned or under contract to his employer, Mobil. He had last worked aboard a submersible rig only two weeks prior to his assignment to the fixed platform from which the helicopter took off on August 15, 1967. In fact, the only reason he was working on a fixed platform was as a temporary replacement for another Mobil employee who was on vacation. Under these circumstances, it is eminently clear that Nation, through his course of em-

ployment with Mobil on various submersible barges, was a seaman who, on the date of his accident, was assigned temporarily by his employer to work not related to any particular vessel. It was, however, work for the benefit of his employer. The situation in regard to Nation was the same as that of a seaman who while ashore on a mission for his employer, receives an injury. He was a seaman prior to being temporarily assigned to the fixed platform in question and did not lose the status by his mere two-week assignment there. Thus, the Fifth Circuit properly held him to be a seaman and his survivors are justly entitled to the benefits and remedies accruing therefrom.

For these reasons, it is submitted that there is no error in the Fifth Circuit holding that Nation was a seaman as this holding is thoroughly consistent with the law as enunciated by this Honorable Court. The judgment of the trial court was clearly erroneous in holding that as a matter of law Nation's status was determined by the situs of his work, thus the Fifth Circuit properly reviewed the facts and applied the proper test required by law. Therefore, there is no necessity for this Honorable Court to exercise its discretion by issuing the writ prayed for by petitioner herein.

III.

Petitioner also requests that this Honorable Court review the decision of both the trial court and the Court of Appeal in applying the doctrine of res ipsa loquitor to find petitioner liable to the survivors of the decedents, Shinn, Higginbotham and Nation. Petitioner asserts that the record did not contain sufficient evidence to maintain the application of this doctrine and further that the doctrine could not be properly applied only to Mobil and not to the other defen-

dant, Bell, as well.

At the trial of the case, a substantial amount of evidence was presented by the various plaintiffs, including petitioner, which sought to show that the crash of the helicopter was due to a defect in its design, construction or manufacture. However, the district judge ruled that the evidence submitted by the plaintiffs was insufficient to hold the manufacturer liable. In fact, it was his finding that there was no evidence to show the specific cause of the crash. However, based upon the totality of the evidence presented, including evidence as to the maintenance schedule of Mobil, the flight record of Mobil helicopters and the past flight history of the particular pilot in question, the court did find that the evidence was sufficient to support holding Mobil liable to the plaintiffs on the basis of res ipsa loquitor. This finding by the trial court was upheld by the Fifth Circuit on appeal.

The doctrine of res ipsa loquitor may be succinctly stated as follows:

> "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Prosser, *Law of Torts*, 4th Edition, 1971, p. 214.

As can be seen from this statement, the doctrine of res ipsa

loquitor essentially requires the occurrence of an act which would not ordinarily happen in the absence of negligence on the part of someone. Further, the defendant against whom the doctrine is invoked must have the exclusive control of the instrument which caused the injury.

Regarding the first requirement, the Fifth Circuit held that the current state of the art in aircraft design, construction, travel, technology, pilot training, etc. now supports the conclusion that aircraft crashes do not normally occur in the absence of negligence. As was stated by the Fifth Circuit in *Williams v. The United States*, 218 F.2d 473 (C.A. 5th Cir. 1955):

> "Res ipsa loquitor is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or a lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown."

On this basis, the Fifth Circuit did not follow the holding in *Morrison v. LeTourneau Co.*, 138 F.2d 339. In *Morrison*, supra, the court had held that res ipsa loquitor could not apply because there was no showing that such accidents do not ordinarily happen even to the most skillful pilot in the finest type airplanes available in 1940. Without doubt, the aircraft industry had made many technological advances in the twenty-four years between the judgment in *Morrison* and the crash of the helicopter involved

in the instant case. Thus, the Fifth Circuit's decision to apply res ipsa loquitor in this instance was clearly correct.

Further support of the application of res ipsa loquitor is supplied by the fact that Mobil was in exclusive control of the helicopter. The helicopter was subject to maintenance by employees of Mobil, Mobil pilots flew the helicopters and the helicopters were stored at Mobil facilities. Therefore, the second element of res ipsa loquitor, that is, the element of control, cannot be denied by petitioner.

That the doctrine was invoked against only one defendant is not a basis for granting the writ sought by petitioner. There was, of course, evidence presented which tended to show that the crash was due to the defective construction and design of the Bell Helicopter. However, this evidence was found insufficient to warrant holding Bell Liable by the district judge. Only after reaching this conclusion, did he then seek to apply res ipsa loquitor to the facts of this case. As stated in his opinion, "the doctrine of res ipsa loquitor in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation." The facts relied on by the trial court included the maintenance record, the flight records of Mobil helicopters, and of the record of the particular pilot in question. These facts were sufficient for the application of res ipsa loquitor by the trial judge. *Higginbotham vs. Mobil*, 357 F. Supp., at Page 1174.

Further, in order to apply res ipsa loquitor, a plaintiff is not required to exclude all other possible theories beyond a reasonable doubt. It is enough that he makes out a case from which the finder of fact may reasonably conclude

that the negligence, more probably than not, was that of the defendant. Restatement (Second) of Torts, Section 328 (D) Comment Subsection (b). As stated by the trial court, the evidence taken as a whole supported the conclusion that res ipsa loquitor was properly applicable against Mobil but not against Bell. The evidence against Bell was merely insufficient to establish liability on its part on a products liability claim. This did not foreclose a finding of negligence against Mobil based on the doctrine of res ipsa loquitor.

Finally, as the Fifth Circuit noted in its opinion, (545 F. 2d at 431).

> "In any event, we may reverse the lower Court's finding of negligence only if we are convinced that it is clearly erroneous. See *Kennedy v. Henderschied*, 5th Cir. 1973, 490 F.2d 85. We are not left with the definite and firm conviction that Judge Scott erred in the inferences he drew from the circumstances of this case or in his conclusion that Mobil failed to rebut those inferences."

Respondents submit the facts relied upon by Judge Scott were a sufficient basis for the application of res ipsa loquitor to the instant case. In the absence of clear error on his part, the judgment of the Fifth Circuit properly affirmed the trial court's decision, and no basis for the granting of petitioner's writ thus appears in the record of this case.

CONCLUSION

In summary, respondents submit that petitioner's arguments relative to the application of *Moragne* to territorial waters only is simply not supported by the *Moragne* decision itself, the cases subsequent to *Moragne*, and leading authorities in the field. This point being settled against the position adopted by petitioner, there is no reason that a writ should issue from this court to review that point.

Further, respondents submit that the Fifth Circuit Court of Appeal properly applied the correct legal test in determining the status of James E. Nation and that the decision of that appellate tribunal was correct on the facts of the instant case, again precluding the necessity of a writ of certiorari to review that holding.

Finally, the application of the well established doctrine of res ipsa loquitor to the facts of the instant case, resulting in the imposition of liability against Mobil only, was clearly supported by the facts shown at the trial of the case and by the law made applicable to these facts through the many years of judicial experience.

Therefore, respondents respectfully urge that this Honorable Court decline to exercise its discretion in issuing a writ of certiorari as requested by petitioner, and let the judgment of the Fifth Circuit Court of Appeal stand as rendered on the issues presented herein.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to Mr. Carl J. Schumacher, Jr., Attorney for Defendant, Mobil Oil Corporation, 1106 Arabella Street, New Orleans, Louisiana 70115, and Mr. A.R. Christovich, Christovich & Kearney, 1815 American Bank Building, New Orleans, Louisiana by placing same in the United States mail postage prepaid and properly addressed.

Gueydan, Louisiana this 8th day of September, 1977.

I. P. Saal, Jr.